AMF Trucking & Warehousing, Inc. ***and*** **International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, AFL–CIO.** Case 22–CA–25263

September 21, 2004

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS WALSH AND MEISBURG

On May 16, 2003, Administrative Law Judge D. Barry Morris issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel and Charging Party filed answering briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions only to the extent consistent with this Decision and Order.

I. INTRODUCTION

The issue in this case is whether the Respondent's statements during the course of negotiations effectively communicated a claim of inability to pay, such that its subsequent refusal to furnish the Union with requested financial information violated Section 8(a)(5) and (1) of the Act. For the reasons set forth below, we find, contrary to the judge, that the Respondent did not claim an inability to pay and, accordingly, did not violate Section 8(a)(5) by refusing to furnish the Union with the requested financial information.

II. RELEVANT FACTS

Beginning in October 2001, the Respondent and the Union held three negotiation sessions for a successor to a collective-bargaining agreement that had expired on June 30, 2001. The sessions focused primarily on the issues of wages, health insurance, and pension plans. On November 20, 2001, during the second negotiation session, the Union proposed increasing the health insurance and pension fund benefits. The Respondent calculated the cost of the Union's proposal to be an additional $3 per hour per employee. The Respondent took the position that no changes should be made to health insurance or pension benefits. The Respondent stated that the Union was asking for "pie in the sky," that the Respondent had purchased the Company "in distress a year and a half earlier, and that the company was still in distress." The Respondent also said that it was "fighting to [stay] alive," and was "weaker this year" than it had been in previous years.

On March 6, 2002, during the third negotiation session, the parties discussed the Union's proposal to change the current wage increase policy. Under that policy, all wage increases were discretionary. The Union proposed a required increase of $1 per hour for each year of a 3-year contract. In response to the Union's proposal, the Respondent took the position that there be no change to its existing wage policy, and explained that it was "still fighting to keep the business alive," and that "the business was weaker than it was in previous years." Upon an inquiry as to its profitability, the Respondent made no reply.

By letter dated April 9, 2002, the Union requested access to the Respondent's financial records. The Respondent, in its April 26 reply letter to the Union, denied that it was claiming an inability to pay and refused to grant the Union access to its financial records.

III. THE JUDGE'S DECISION

The judge found that the Respondent's refusal to supply the requested information violated Section 8(a)(5). In determining that the Respondent effectively communicated an inability to pay, the judge found the Respondent's comments to be similar to those at issue in *Lakeland Bus Lines*, 335 NLRB 322 (2001), enf. denied 347 F.3d 955 (D.C. Cir. 2003).

In *Lakeland*, supra, the Board found that an employer effectively claimed an inability to pay by statements contained in a letter to the bargaining unit employees. The employer's letter followed 11 negotiation sessions during which the employer rejected the union's bargaining proposals. The letter urged the unit employees to accept the employer's final offer, stating that the employer was "trying to bring the business back into the black," that acceptance of the employer's final offer would enable the employer to "retain [employee] jobs and get back into the black short term," and that "the future" of the employer "depends on it." Asserting that the employer had claimed an inability to pay, the union requested access to the company's financial records. In response, the employer stated that "no claim of financial inability, explicit or implicit, was made by . . . any company official," and that "at no time did . . . any company official claim an inability to pay or a prospective inability to pay during the life of the contract being negotiated." The employer therefore refused to furnish the information. The Board concluded that the employer's refusal to furnish the re-

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

quested financial information violated Section 8(a)(5). The D.C. Circuit denied enforcement of the Board's Order in *Lakeland*. The court concluded that the Board had taken the employer's statements out of context, i.e., without the context of the letter in which they were written, and that the Board had not considered these statements in the context of the entire course of bargaining. *Lakeland Bus Lines*, 347 F.3d at 962, 963.[2]

Analysis

We disagree with the judge's finding. For the reasons set forth below, we find that the Respondent did not communicate an inability to pay, and, thus, the Respondent's refusal to furnish the requested information did not violate Section 8(a)(5).

At the outset we note that the phrase "inability to pay" means, by definition, that the employer is incapable of meeting the union's demands. That is, the phrase means more than the assertion that it would be difficult to pay, or that it would cause economic problems or distress to pay. "Inability to pay" means that the company presently has insufficient assets to pay or that it would have insufficient assets to pay during the life of the contract that is being negotiated. Thus, inability to pay is inextricably linked to nonsurvival in business. Consistent with this analysis, the Respondent here has not claimed an inability to pay, as it has neither claimed insufficient assets nor stated that acquiescence to the Union's demands would cause it to go out of business.

The Respondent said that the Company it had purchased was in distress, and that the Company was still in distress. As indicated above, this is not to say that the Respondent now has, or will have, insufficient assets to pay. Similarly, the Respondent said that it was "fighting to keep the business alive." That is what is to be expected when a company is in distress. The statement is not synonymous with an assertion that the Respondent currently has, or will have, insufficient assets to pay.

As stated above, the judge relied on the Board's decision in *Lakeland Bus Lines*, supra, to support his finding that the Respondent's statement constituted a claim of inability to pay. In *Lakeland Bus Lines*, the employer said, inter alia, that "the future of Lakeland depends on" acceptance of the company's offer. Similarly, employee jobs were dependent on such acceptance. In sum, the company would fail unless the union accepted the company's offer. That statement is distinguishable from those made herein. Most significantly, the Respondent never said that the survival of the Company was at stake, i.e., that the Company would have no future if the Company's demands were rejected. Thus, the Respondent's statements in this case present a far weaker basis upon which to find a Section 8(a)(5) violation than did the statements at issue in *Lakeland Bus Lines*. Accordingly, even if we were to accept the Board's interpretation of *Lakeland Bus Lines* over that of the D.C. Circuit (a matter on which we do not pass), we find that that case does not support a finding that the Respondent's comments conveyed a claim of inability to pay.

We also find that the statements at issue here are distinguishable from those found to constitute a claim of inability to pay in *Shell Co.*, 313 NLRB 133 (1993). In *Shell Co.*, the employer rejected the union's bargaining demands by characterizing its financial situation as "a matter of survival." That is, acceptance of the union's demands would have meant the nonsurvival of the company. In the present case, there are no such bleak predictions about going out of business.

Our dissenting colleague contends that the Respondent "clearly communicated that it could not afford the Union's demands." We disagree. The Respondent did not use those words or any words with a similar import. The phrase "could not afford" means that the company could not stay in business if it met the Union's demands. This is not the message that the Respondent gave. Rather, as noted above, the Respondent stated only that the business was not doing well—that it was in "distress" and "fighting to keep the business alive." That was not to say that the fight would be lost if the Union's demands were met. These statements simply do not convey that the Respondent would go out of business if it were to meet the Union's economic demands.

Our colleague seeks a new test for cases involving a refusal to give information. He says: "[A]ll that should be required in order to find that an employer's statements have triggered a duty to provide financial information is that the employer's words, reasonably interpreted, claim that it is financially unable to pay the union's bargaining demands." However, the very case that he cites for that proposition (*Atlanta Hilton & Tower*, 217 NLRB 1600 (1984)) makes it clear that "words and conduct must be specific enough to convey [a claim of inability to pay]." The burden is on the General Counsel to establish that the words and conduct are sufficiently specific. In the instant case, the words were not of this character.

Our colleague says that we are holding that an employer can plead an inability to pay, and then retract it and thereby avoid an obligation to supply financial information. That is not our holding. Rather, our holding is that the General Counsel did not prove that the Respondent *ever* pleaded an inability to pay.

[2] The court's decision issued after the judge's decision in the instant case.

In sum, we find that the Respondent did not claim an inability to pay the Union's demands. Accordingly, the Respondent did not violate Section 8(a)(5) of the Act by refusing to provide the Union with requested financial information.

ORDER

The complaint is dismissed

MEMBER WALSH, dissenting.

The judge's finding that the Respondent's negotiation statements effectively claimed a present inability to pay and that the Respondent violated Section 8(a)(5) and (1) by refusing to furnish the Union with requested financial information is in accord with Board and court precedent, and should be adopted. Accordingly, I dissent from my colleagues' failure to adopt the judge's decision.

I have no quarrel with my colleagues' recitation of the facts. I disagree only with their interpretation of the facts. The Union and the Respondent held three negotiation sessions for a successor contract. These sessions focused primarily on financial issues, such as wages, health insurance, and pension plans. At the parties' second session on November 20, 2001, the Union proposed increasing health insurance and pension fund benefits. After a caucus during which the Respondent's representatives calculated the cost of the Union's health insurance proposal, the Respondent told the union representatives that they were asking for "pie in the sky." The Respondent followed this comment with the assertion that it "bought the business in distress a year and a half earlier, and the company was still in distress."

By the time of the parties' third negotiation session on March 6, 2002, the Respondent's financial health assertedly had become even more desperate. At this session the Union again focused on its economic demands. The Respondent answered these demands by informing the Union that its business was "weaker this year than it was in previous years." Thus, the Respondent painted an even bleaker economic picture by effectively asserting that it was even worse off now than it was before, when it was in financial "distress." The Respondent left no doubt that its financial circumstances were too dire to permit any accommodation of the Union's economic demands when it further informed the Union that things had deteriorated to the point that it was "fighting to keep the business alive."

Shortly thereafter the Union sent the Respondent a letter requesting, based on the Respondent's claims that it was "in distress," "weaker than last year," and "fighting to keep things going," that the Union be permitted to examine the Respondent's financial records to determine the validity of the Respondent's claims. In its reply 2 weeks later, the Respondent denied the Union's version of what the Respondent had claimed during negotiations.[1] The Respondent also refused the Union's request to examine its financial records.

Analysis

As the Supreme Court has held, an employer is required to comply with a union's request for financial information to verify the employer's claim of economic inability to pay the union's bargaining demands.[2] There are no magic words required to trigger this obligation; rather, "so long as the employer's refusal reasonably interpreted is the result of financial inability to meet the employees' demand rather than simple unwillingness to do so, the exact formulation used by the employer in conveying the message is immaterial." *Atlanta Hilton & Tower*, 271 NLRB 1600, 1602 (1984).

The Respondent clearly communicated to the Union that it could not afford the Union's bargaining demands. In response to these demands, the Respondent conveyed an ever worsening financial picture in which the Respondent's economic health had degenerated from one of "distress" to an even worse circumstance than being in distress and finally to the dire economic situation of "fighting to keep the business alive." These were no mere claims of general economic difficulties, business losses or competitive disadvantage. See, e.g., *Lakeland Bus Lines v. NLRB*, 347 F.3d 955, 961 (D.C. Cir. 2003); *Stroehmann Bakeries, Inc. v. NLRB*, 95 F.3d 218, 222 (2d Cir. 1996). Instead, they was a claim that if the Respondent had to pay the Union's bargaining demands it would lose its fight for economic life. It is hard to imagine how the Respondent could have more clearly com-

[1] The judge credited the Union's version of what the Respondent stated during the parties' negotiation sessions, and neither the majority nor I see any basis for overturning the judge's credibility resolutions. I also note that the Respondent makes no claim that its reply to the Union's letter "clarified" the statements that it made during negotiations. Rather, the Respondent merely argues that it did not make the statements attributed to it. In any event, it would be unavailing for the Respondent to attempt to avoid its obligation to provide the Union with financial information through the simple expedient of issuing a "clarifying statement" that does no more than claim that it never said what it in fact did say. If that were all it took to avoid an obligation to turn over financial information then, as a practical matter, employers would be excused from ever having to provide financial information. Under such an approach, an employer could make whatever financial inability to pay claims it wanted to and then, if the union requested financial information to determine the validity of the employer's claim, the employer could simply issue a "clarifying statement" saying that it never claimed financial inability to pay and thereby avoid ever having to turn over financial information. This approach would give the green light to the sort of negotiation game playing that is the antithesis of good-faith bargaining.

[2] *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149, 152–153 (1956).

municated to the Union that it could not afford the Union's bargaining demands.[3]

All that should be required in order to find that an employer's statements have triggered a duty to provide financial information is that the employer's words, reasonably interpreted, claim that it is financially unable to pay the union's bargaining demands.[4] The judge found that the Respondent's words conveyed that message here, a finding that is well supported by precedent. See, e.g., *Shell Co.*, 313 NLRB 133 (1993) (economic conditions had affected the company "very badly" and rejection of the union's economic demands was a matter of "survival"); *Coast Engraving Co.*, 282 NLRB 1236 fn. 1 (1987) (cost savings needed in order for employer to stay in business and recoup bad losses); *Cowin & Co.*, 277 NLRB 802 fn. 1 (1985) (real question whether employer will be in business at the termination of contract); *Mashkin Freight Lines*, 272 NLRB 427, 435 (1984) (employer needed reductions in costs if it was to survive); *Stamco Division, Monarch Machine Tool Co.*, 227 NLRB 1265, 1266 (1977) (employer not in healthy position, projections of the future did not look great); *Tony's Meats, Inc.*, 211 NLRB 625, 626 (1974) (large monthly losses during a strike and "can't do anything else"); *Celotex Corp.*, 146 NLRB 48, 54 (1964), enfd. in relevant part 364 F.2d 552 (5th Cir. 1966) (plant not being operated profitably and negotiations would be conducted on the basis of what employer could afford); *Taylor Foundry Co.*, 141 NLRB 765, 767 (1963), enfd. 338 F.2d 1003 (5th Cir. 1964) (employer contended that if it increased its labor costs it would lose its margin of profit and "we can't exist").

Accordingly, I respectfully disagree with my colleagues, and would adopt the judge's decision finding that the Respondent's negotiation statements effectively claimed a present inability to pay, and that the Respondent violated Section 8(a)(5) and (1) by refusing to furnish the Union with requested financial information.

Saulo Santiago, Esq., for the General Counsel.
David Greenhaus, Esq. and *Arthur Kaufman, Esq.*, for the Respondent.
Jeremy Meyer, Esq., for the Union.

DECISION

STATEMENT OF THE CASE

D. BARRY MORRIS, Administrative Law Judge. This case was heard before me in Newark, New Jersey, on January 15, 2003. Upon a charge filed on June 27, 2002.[1] and amended on August 14, a complaint was issued an October 30, alleging that AMF Trucking & Warehousing, Inc. (Respondent or AMF) violated Section 8(a)(1) and (5) of the National Labor Relations Act (the Act). Respondent filed an answer denying the commission of the alleged unfair labor practice.

The parties were given full opportunity to participate, produce evidence, examine and cross-examine witnesses, argue orally and file briefs. The parties filed briefs on March 7, 2003.

Upon the entire record of the case, including my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent has been engaged in the warehousing and trucking business. It has admitted, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. In addition, it has been admitted, and I find, that UAW (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICE

A. The Facts

AMF and the Union were parties to a collective-bargaining agreement effective July 1, 2000, through June 30, 2001. Upon expiration of the agreement the parties began negotiations for a successor agreement. Negotiating sessions were held on October 30 and November 20, 2001, and March 6, 2002. Arthur Kaufman, Esq. and Meyer Gross represented Respondent. Scott Sommer was the lead negotiator for the Union.

At the November 20 session the parties discussed overtime issues as well as the costs of the health insurance and pension plans. Kaufman and Gross caucused, at which time Kaufman

[3] Contrary to the majority, the Board's decision in *Lakeland Bus Lines*, 335 NLRB 322 (2001), enf. denied 347 F.3d 955 (D.C. Cir. 2003), supports a finding that the Respondent here claimed a financial inability to pay. In *Lakeland Bus*, supra, the employer sent its employees a letter urging them to accept the employer's final contract offer, stating that the employer was "trying to bring the bottom line back into the black," that acceptance of the offer would enable the employer to "retain your jobs and get back in the black in the short term," and that the "future of Lakeland depends on it." The Board found that these statements effectively asserted that the company's "circumstances were bad and were a matter of survival," and reasonably conveyed a present inability to pay. 335 NLRB at 324–325. Likewise, the Respondent here clearly represented that it would lose its fight for economic life if it acceded to the Union's bargaining demands, and thereby reasonably conveyed an inability to pay the Union's bargaining demands. Furthermore, even if one were to accept the D.C. Circuit's interpretation of the facts in *Lakeland Bus*, the facts here present a much stronger case for finding a claim of inability to pay. The court held that the employer's statements in *Lakeland Bus* were vague and claimed no more than short-term business losses, especially in light of later clarifying statements that provided that the employer was not claiming financial inability to pay. 347 F.3d at 963. In contrast, the Respondent here made assertions, unaltered by clarifying statements, that suggested a very different scenario: if it agreed to the Union's economic demands it could no longer stay alive financially.

[4] My colleagues suggest that I am proposing a new test for determining whether an employer has claimed an inability to pay because I would assess an employer's claim based on a "reasonable interpretation" of the employer's words. This is not a "new test." See *Atlanta Hilton & Tower*, supra, 271 NLRB at 1602 ("so long as the employer's refusal *reasonably interpreted* is the result of financial inability to meet the employees' demand") (emphasis added).

[1] All dates refer to 2002, unless otherwise specified.

testified that they calculated that the cost of the health insurance was $3 per hour. Kaufman testified that when they returned from caucus, he told the union representatives that they were asking for "pie in the sky." Sommer testified that besides the remark about "pie in the sky," Kaufman also stated that "they bought the business in distress a year and-a-half earlier, and the company was still in distress."

During the third session the union representatives mentioned that not all of the employees were receiving the 5-cent increase that they were supposed to receive. Sommer testified that when they were discussing the Union's economic demands, Kaufman stated, "[T]hey're still fighting to keep the business alive." Sommer also testified that Gross stated, "[T]he business was weaker this year than it was in previous years." Sommer testified that he asked whether the Company was making a profit and that "they said they would have to check into that and get back to us, and we received no information about the company's profit."

On April 9, 2002, Sommer wrote to Kaufman, stating in part:

> [D]uring the negotiations, the company has rejected all our economic proposals stating that the company was "in distress" when the current owners purchased it and that "it is still in distress". It was further stated at negotiations . . . that the company is "fighting to keep going" and that it is "weaker than last year". As you have thus refused to make any counter offer on our economic demands and are in essence claiming an inability to meet our economic demands we are therefore requesting to examine the company's books and records to determine the validity of your claim.

On April 26, Kaufman responded to Sommer, denying Sommer's version of what transpired at the negotiations. The letter stated, "[Y]our request to examine the books and records of the Company is denied."

B. Conclusions and Discussion

1. Concluding findings

Sommer appeared to me to be a credible witness. I credit his testimony that at the November 20, 2001 negotiating session Kaufman stated, "[T]hey bought the business in distress a year and-a-half earlier, and the company was still in distress." It is noteworthy that in his letter to Sommer of April 26, Kaufman stated, "[A]t still another time, you inquired if the company was still in distress as it was at the time of the purchase and we responded affirmatively."

I also credit Sommer's testimony that during the third session, when the Union's economic demands were being discussed, Kaufman stated, "[W]e're still fighting to keep the business alive," and that Gross stated that the "business was weaker this year than it was in previous years." In this regard Sommer's bargaining notes indicate that Kaufman stated that the business is "fighting to keep going" and that Gross stated that the business was "weaker than last year." Kaufman's bargaining notes for that session indicate that the question was asked, "How is business doing?" and the reply was "fair, worse than last year."[2]

I, thus, conclude that at the November 20, 2001 bargaining session Kaufman stated that when they bought the Company it was in distress and the "company was still in distress." At the third session Kaufman stated that "they're still fighting to keep the business alive" and Gross stated that the business was "weaker this year" than in previous years. Sommer's question whether the Company was showing a profit was not responded to.

2. Discussion

If a company claims inability to pay increased wages, its failure to substantiate the claim may result in a finding of a failure to bargain in good faith. *NLRB v.Truitt Mfg. Co.,* 351 U.S. 149, 152–153 (1956). Inability to pay need not be expressed with any particular "magic phrase." *Monarch Machine Tool Co.*, 227 NLRB 1265, 1267 (1977); *Atlanta Hilton & Tower*, 271 NLRB 1600, 1602 (1984).

In *Lakeland Bus Lines*, 335 NLRB 322 (2001), after the company submitted its final offer to the union, the company's president sent a letter to the employees, which stated, in pertinent part, "[W]e are trying to bring the bottom line back into the black." The Board stated (supra at 323): "We find that under *Truitt* . . . and its progeny, the Respondent's . . . letter to employees effectively communicated that it was unable to afford to pay anything more than that contained in its final offer." The Board held (supra at 326) that this claim "triggered an obligation to furnish the Union with the requested financial information." Failure to do so constituted a violation of Section 8(a)(5).

I believe that Respondent's statements that the Company was "still in distress" and that they're still "fighting to keep the business alive," similar to the statement in *Lakeland*, supra, communicated that the Company was unable to afford to pay anything more than its final offer. When the Union requested financial information to substantiate its claim, I believe that Respondent was required to furnish the information. Under *Lakeland*, supra, the failure to furnish such information is a violation of Section 8(a)(1) and (5) of the Act.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Union is the exclusive representative of the following appropriate unit of employees:

> All warehouse employees employed by Respondent at its Carteret and Avenel, NJ locations, but excluding all office clerical employees, drivers, helpers, sales employees, professional employees, including guards and supervisors as defined in the Act.

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[2] Counsel for Respondent contends that the entire statement was a question. A fair reading persuades me, however, that inasmuch as the question mark appears after "How is business doing?" that that was the question. I credit Kaufman's testimony that the reply was "fair, worse than last year."

4. By failing and refusing to furnish the Union with the financial information requested in its letter of April 9, 2002, Respondent has engaged in an unfair labor practice, in violation of Section 8(a)(1) and (5) of the Act.

5. The aforesaid unfair labor practice constitutes an unfair labor practice affecting commerce, within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent has engaged in an unfair labor practice in violation of the Act, I shall order it to cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

[Recommended Order omitted from publication.]